intention to set aside that order on the same facts as pleaded in the inquiry and appeal, he should have taken steps to appeal, against the decision of the officer hearing the appeal, to the High Court under section 16(1) of the Ordinance. In the result, I found that his prayer was misconceived and also dismissed it together with the third prayer (for the defendant to register a transfer of the lot to the plaintiff failing which the Senior Assistant Registrar Kota Bharu is empowered to do so) with costs.

In the cases referred to, much has been said as to whether an aggrieved party should file an appeal under section 16(1) of the Ordinance or file a fresh suit under section 10(1) of that Ordinance. In a well reasoned judgment, Zahir J. in *Mek binti Idris* v. *Nor bin Awang*[6] had stated his interpretation of the relevant sections of the Ordinance and I fully agree with him. Where an aggrieved party who is a person entitled to be registered as proprietor files a suit claiming superior title, he can, as in this case, file an action under section 10 of the Ordinance but as I have stated earlier, on the facts I had found that the lot had in fact been sold to the defendant. As regards his claim that the District Officer had acted *ultra vires* the Ordinance, I found that this was a proper case for appeal under section 16(1) of the Ordinance as the prayer necessitated the setting aside of a previous order by the District Officer based on the same facts. However apart from it being wrongly brought, I also held that in the circumstances, even if it was correctly brought by way of appeal, there was no evidence to show that the hearing officer had acted wrongly or beyond the scope of the Ordinance and I was of the view that his decision on those facts was correct.

Accordingly I dismissed the plaintiff's claim with costs.

Claim dismissed.

Solicitors: *Mahmood Adam, Wan Ismail & Co.; Che Man & Partners.*

MEJAR SUNDARAJ v. LT. KOL. ABDUL AZIZ BIN HANAFI & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) September 23, December 5 & 17, 1985]

[Penang – Originating Motion No. 12 of 1985]

Administrative Law – Application for leave to apply for Order of Certiorari – Order of Court Martial – Whether absence or excess of jurisdiction by Court – Armed Forces Act 1972, ss. 61(a) & 87 – Armed Forces (Court Martial) Rules of Procedure 1976, rr. 79, 79(c), 103 & 103(4).

Military Law – Court Martial – Charges – Fraudulent misapplication of service property – Conduct to the prejudice of good order and services discipline – Dismissal from service – Armed Forces Act 1972, ss. 61 & 87.

This was an application by way of Notice of Motion by the applicant Mejar Sundaraj for an Order of Certiorari to remove into the High Court for the purpose of it being quashed an order of Mahkamah Tinggi Tentera Pulau Pinang given on April 20 that the applicant be dismissed from His Majesty's service. There were eight charges against him: seven for fraudulent misapplication of service property under section 61(a) of the Armed Forces Act 1972 and one for conduct to the prejudice of good order and services discipline under section 87 of the same Act. The following grounds were pleaded by the applicant:

(1) the Court failed to act judicially in its determination of the issues before it.

(2) the Court was wrong in law in finding the applicant guilty.

(3) the Court was wrong in law in deciding that:

(i) the applicant acted in his official capacity as Divisional Staff Paymaster at all material times;

(ii) the applicant was entrusted with the money;

(iii) the applicant undertook or was bound by law to use or dispose of the money for a specified purpose;

(iv) the applicant misappropriated the money for his own use other than for the authorised purpose;

(v) the applicant acted with dishonest intention.

(4) the Court failed to apply the proper onus of proof that was required in the case for the defence.

(5) the Court failed to take into consideration the defence put up by the applicant or at all.

(6) there was no, or alternatively insufficient, evidence to support or justify the finding of the Court.

(7) the Court did not come to its independent finding as to the verdict.

(8) the Honourable the Judge Advocate exceeded in his jurisdiction in directing the Court as to how and what finding they should arrive at.

(9) the Court displayed an overt exercise of bias throughout the trial.

(10) the Order of the Court was in total disregard of all the evidence led and available.

(11) the Court used or had a tendency to use double standards in determining the issues.

Held, dismissing the application: (1) grounds (2), (4) – (7) & (10): excess of jurisdiction was not shown merely because the inferior court had decided contrary to the facts or without evidence to justify its decision, but it was shown where in the circumstances it had no jurisdiction. Even assuming that there was an error of fact made by the Court Martial, certiorari still could not lie;

(2) ground (3): the act of the Court Martial in coming to its conclusion must have been based on the evidence of the witnesses, the submission of counsel and the summing-up of the Judge Advocate. Such a finding was neither in absence nor in excess of his jurisdiction;

(3) grounds (9) & (11): they were bare averment, unsubstantiated by any evidence. They were serious allegations made against the Court Martial which would require proof thereof;

(4) grounds (1) & (8): rule 103 on the whole provides for general duties of the Judge Advocate to advise on the law relating to the Constitution of the Court, the charge sheet and procedure. There was thus a distinction between rule 79 which clearly provided for summing-up by the Judge Advocate and Rule 103(4) couched in general terms which set out his duties during the trial. There was no hard and fast rule as to the manner the summing-up by the Judge Advocate should be done;

(5) civil courts ought not to apply the rigorous tests sometimes applied in questioning the acts of the civil court of summary jurisdiction. A reasonable latitude should be allowed and mere mistakes of procedure, if actual jurisdiction existed, ought not to receive undue weight;

(6) the applicant had failed to show in any of his grounds that there was any absence or excess of jurisdiction to enable the Court to come to a finding that the order of the Court Martial dated April 20, 1984 be removed into the High Court for it to be quashed.

Cases referred to:

(1) *R.* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 K.B. 338.
(2) *Walsall Overseers* v. *London and North Western Railway Co.* (1878) 4 App. Cas. 30, 39.
(3) *Ex parte John Fogan* 48 D.L.R. 194.
(4) *R.* v. *Nat Bell Liquors* [1922] 2 A.C. 128.
(5) *Minister of Labour and Manpower & Anor.* v. *Paterson Candy (M) Sdn. Bhd.* [1980] 2 M.L.J. 122.
(6) *Heddon* v. *Evans* 35 T.L.R. 642.

See also *de Smith's* Judicial Review of Administrative Action, 4th edn. (1980) at p. 146.

ORIGINATING MOTION.

Bala Mahesan for the applicant.
Mary Lim (Miss) and subsequently *T. Selventhiranathan* (Senior Federal Counsel) for the respondents.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an application by way of Notice of Motion by the applicant Mejar Sundaraj s/o Chelliah for an Order of Certiorari to remove into this High Court for the purpose of it being quashed an order of Mahkamah Tinggi Tentera Pulau Pinang given on April 20, 1984, that the applicant be dismissed from His Majesty's service. The grounds upon which the relief is sought are as follows:

(1) The Court failed to act judicially in its determination of the issues before it.

(2) The Court was wrong in law in finding the applicant guilty.

(3) The Court was wrong in law in deciding that:

(i) the applicant acted in his official capacity as Divisional Staff Paymaster at all material times;

(ii) the applicant was entrusted with the money;

(iii) the applicant undertook or was bound by law to use or dispose of the money for a specified purpose;

(iv) the applicant misappropriated the money for his own use other than for the authorised purpose;

(v) the applicant acted with dishonest intention.

(4) The Court failed to apply the proper onus of proof that was required in the case for the defence.

(5) The Court failed to take into consideration the defence put up by the applicant or at all.

(6) There was no, or alternatively insufficient, evidence to support or justify the finding of the Court.

(7) The Court did not come to its independent finding as to the verdict.

(8) The Honourable The Judge Advocate exceeded in his jurisdiction in directing the Court as to how and what finding they should arrive at.

(9) The Court displayed an overt exercise of bias throughout the trial.

(10) The Order of the Court was in total disregard of all the evidence led and available.

(11) The Court used or had a tendency to use double standards in determining the issues.

Before considering the points raised in the grounds of the applicant it is useful to consider the principles governing application for certiorari. Certiorari is available to quash a decision for error of law if the error appears on the face of the record (*R.* v. *Northumberland Compensation Appeal Tribunal, ex parte Shaw*[1]). What this phrase means is that "if there was upon the face of the order of the Court of quarter session anything which showed that the order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it and to look at the order and view it upon the face of it, and if the Court found error, upon the face of it to put an end to its existence by quashing it." (per Lord Cairns in *Walsall Overseers* v. *London and North Western Railway Co.*[2]).

As for the record, according to Denning L.J. in *R.* v. *Northumberland (supra)*, "it must contain at least the document which initiates the proceedings *e.g.* the pleadings, if any and the adjudication, but not the evidence, save in the case of conviction, nor the reasons unless the tribunal chooses to incorporate them. If the tribunal does state its reasons and these reasons are wrong in law, certiorari lies to quash the decision." There is no distinction to be drawn between proceedings of a criminal nature and civil proceedings (per Singleton L.J. in *R.* v. *Northumberland (supra)*). In the present case, I have admitted the record of proceedings of the Court Martial and marked it as 'A'.

In the present case the order sought to be quashed is the order of Court Martial dated April 20, 1985, which was presided by the first respondent whereby after the completion of the trial the Court Martial found the applicant guilty of eight charges. He was convicted and the sentence passed was dismissal from His Majesty's service. Originally eleven charges were preferred against him but during the course of the trial one charge was withdrawn and in two other charges his defence was not called. The eight charges relate to service charges, seven were for fraudulent misapplication of service property under section 61(a) of the Armed Forces Act 1972 and one charge was for conduct to the prejudice of good order and services discipline under section 87 of the same Act.

The principles upon which superior courts have control over Court Martial are stated in the judgment of Hazen C.J. in *Ex Parte John Fogan*[3] where he stated at p. 196:

"Before dealing with what I regard as the substantial point in connection with the case, I might refer to the principles upon which a civil Court should act on appeals from the decision of military tribunals. The members of court martial are undoubtedly amenable to the superior civil Courts for injury caused to any person by acts done without jurisdiction or in excess of jurisdiction, although there is not in the ordinary sense of the word an appeal from an ordinary court martial or from the order of an officer, if the injury affects only the military position of the person affected. The dismissal of an officer from the service, the deprivation of rank or the deprivation of military pay will not be remedied by a Court of law. If a court martial convicts the accused of an offence which is not an offence under the Army Act (see R.S.C. 1906, c.41, ss. 74, 75) or of an offence with which he was not charged, it acts without jurisdiction, and where the offence is not properly charged the accused may be held not to have been charged with an offence at all. It has been held, however, that the proceedings of military courts will not be scrutinized with the same strictness as those of inferior civil Courts. The result of acting without jurisdiction is that the Act is void, and the conviction and proceedings may very properly be set aside by a superior civil Court. It was held in *Re Manserg* (1861), 1 B. & S. 400, 121 E.R. 764, that a writ of certiorari will issue only when the rights affected by the judgment of the Court are civil rights and the Court is acting without jurisdiction, and will not issue when the rights affected are dependent upon military status and military regulations. In giving judgment in that case, Cockburn J. said that he agreed that when the civil rights of a person in military service are affected by the judgment of a military tribunal, in pronouncing which the military tribunal had either acted without jurisdiction or had exceeded its jurisdiction, the Court ought to interfere to protect those civil rights, *e.g.*, where the rights of life, liberty or property are involved."

Applying the above principle, let us now consider the various grounds raised in order to discover whether or not the acts of the Court Martial in the present case are in absence or in excess of jurisdiction. For it is only on the question of jurisdiction that this Court can entertain an application for the Writ of Certiorari. Upon a cursory reading of the grounds and the relevant parts referred to in the record of proceedings ('A') one is inclined if not justified in commenting that this application is nothing more but a disguised form of appeal against the decision of the Court Martial. Consider the effect of grounds (2), (6), (7) and (10) together. Here, in my opinion, the quarrel of the applicant is that the Court Martial erred in law in find-

ing the applicant guilty because there was no sufficient evidence adduced by the prosecution against him to warrant a conviction or that the Court failed to consider all the evidence in coming to its findings. Again, consider the effect of grounds (4) and (5). These relate to burden of proof required to be discharged by the defendant and the weight to be given to the defence. It is said that excess of jurisdiction is not shown merely because the inferior court has decided contrary to the facts or without evidence to justify its decision, but it is shown where in the circumstances it has no jurisdiction: *R.* v. *Nat Bell Liquors.*[4] Even assuming that there was an error of fact made by the Court Martial, certiorari still cannot lie: *Minister of Labour and Manpower & Anor.* v. *Paterson Candy (M) Sdn. Bhd.*[5]

For ground (3) I find that the act of the Court Martial in coming to its conclusion must have been based on the evidence of the witnesses, the submission of counsel and the summing-up of the Judge Advocate. Such a finding is neither in absence nor in excess of his jurisdiction. I therefore find no substance in counsel's argument on this ground. As for grounds (9) and (11), I agree with the submission of the learned Senior Federal Counsel that they are bare averments, unsubstantiated by any evidence. They are serious allegations made against the Court Martial which, needless to say, would require proof thereof.

Grounds (1) and (8) appear to touch on the question of jurisdiction, in particular it is contended that the Judge Advocate exceeded his jurisdiction by expressing his personal opinion on the facts. Under ground (1) it is contended that Rule 79 of the Armed Forces (Court Martial) Rules of Procedure 1976 does not apply because there was no specific finding. Rule 79 states as follows:

"79. After the closing address, if there is a Judge Advocate he shall –

a) advise the Court upon the law relating to the case;

b) sum up the evidence; and

c) advise the Court as to any special finding it may make.

Counsel also refers to Rule 103(4) which states that after the closing address the Judge Advocate shall sum up the evidence and advise the Court upon the law relating to the case before the Court close to deliberate on their finding. If in the course of deliberating on their finding the Court require further advice from the Judge Advocate they shall suspend their deliberation and ask and be given such advice in open court. The contention of learned counsel that because there was no special finding under Rule 79(c), the entire Rule 79 does not apply is untenable. With regard to Rule 103(4), in my opinion Rule 103 on the whole provides for general duties of the Judge Advocate to advise on the law relating to the constitution of the Court, the charge sheet and procedure. There is thus a distinction between Rule 79 which clearly provides for summing-up by the Judge Advocate and Rule 103(4) couched in general terms set out his duties during the trial.

From the record of proceedings ('A') at 225 (Kembaran F) it is clear to me that the Judge Advocate gave a detailed summing-up of the case for the benefit of the Court Martial from the evidence adduced during the trial which included the law relevant to the charges preferred against the applicant. No doubt he expressed some opinion of his own which he reminded the Court Martial that they were not obliged to agree or accept. In my opinion, there is no hard and fast rule as to the manner the summing-up by the Judge Advocate should be done. However, after reading his lengthy summing-up which runs over 20 typewritten pages, I am satisfied that what he did was correct and proper. I must add here that the summing-up of the case was on a similar line adopted by Judges in jury trials.

On the submission of counsel that the Court Martial had failed to deliberate after the summing-up by the Judge Advocate, it is clear to me that there is no basis for such contention because upon reading Kembaran F at p. 245 of 'A' I am satisfied that there was a direction by the Judge Advocate to the Court Martial to retire and deliberate on their findings. In Kembaran G (p. 247) the finding of the President of the Court Martial was handed down. It appears that the President had failed to mention that such a finding was made after deliberation. Again I am satisfied that this is not fatal.

Lastly it must be remembered civil courts ought not to apply the rigorous tests sometimes applied in questioning the acts of the civil court of summary jurisdiction. A reasonable latitude should be allowed and mere mistakes of procedure, if actual jurisdiction existed, ought not to receive undue weight (*Heddon* v. *Evans*[6]).

In the circumstances, in my judgment the applicant has failed to show in any of his grounds that there is any absence or excess of jurisdiction

to enable me to come to a finding that the order of the Court Martial dated April 20, 1984, be removed into this Court for it to be quashed. This application is therefore dismissed with costs.

Application dismissed.

Solicitors: *Bala Mahesan & Co.*

RE YII HENG KIEW & ANOR. *EX PARTE* SIONG LING (PTE) LTD.

[O.C.J. (Chong Siew Fai J.) January 7, 1986]

[Sibu – In Bankruptcy No. 7 of 1978]

Bankruptcy – Sale of land by bankrupt – Adequacy of consideration – Payment by purchaser to chargee – Declaration sought by Official Assignee.

The case concerns the valuation as at November 16, 1978, of a piece of land conveyed by a bankrupt to the respondent for the consideration of $2,000. The respondent had paid $8,274 to a bank for the discharge of the subject land. The applicant contended that the sale consideration was below the market value. The court accepted the value of the land at $21,000.

Held: (1) there should be a declaration that the consideration for the conveyance by the bankrupt Yii Hieng Kiew to the respondent Yii Hieng Lai of the subject land *vide* Memorandum of Transfer dated October 4, 1978 and registered at the Land Office, Sibu on November 16, 1978 as Sibu Instrument No. L.4863/1978 was lower than the fair market value of the subject land at the time of the said conveyance;

(2) judgment for the applicant against the respondent in the sum of $10,726 being the difference between the value of the consideration paid by the respondent and the fair market value of the subject land at the time of the conveyance of the subject land;

(3) costs of and incidental to this motion be paid by the respondent to the applicant. In the absence of an agreement, such costs to be taxed.

BANKRUPTCY.

Latip bin Mohammad for the Official Assignee.
Stephen Chung for the respondent.
Charles Ling for the petitioning creditor.

Cur. Adv. Vult.

Chong Siew Fai J.: Having heard submissions on behalf of both parties and having considered the evidence adduced, I prefer the evidence of R.W.1 Wong Ing Siong to that of A.W.1 Ling Swee Tai on the valuation of the land in question at the material date of November 16, 1978. The comparable sales that Ling relied on were those in 1979 and 1980 *i.e.* after November 11, 1978. The sales relied on by Wong took place before, in and after November 1978. I consider, of particular significance, item (a) in paragraph 6 of Wong's affidavit made on October 30, 1985, relating to sale of Lot 404 Block 11 Seduan Land District containing 2.82 acres in November 1978 for $24,500/– which worked out to be at $21,468.67 per hectare. Wong's opinion of the subject land, being at $21,000/– on November 16, 1978, is not far from the assessment by the Sibu Land Office (to which Ling was attached) in the transfer, Instrument L. 4863/1978 (LM4) where the subject land was valued at $22,000/– on November 16, 1978. Though there is evidence of general trend of increase in landed property in the vicinity of the subject land between 1977 and 1980, no specific evidence of the rate of increase was given between the date of "LM3" (September 3, 1977) and November 1978. And it would not be right for the court to speculate.

I accept Mr. Wong as a qualified valuer. He visited the locality. He took into consideration factors that are material for purpose of valuation. On the evidence as adduced, I accept his testimony of valuation of the subject land *i.e.* $21,000/– as at November 16, 1978.

The transfer of the subject land registered on November 16, 1978, was subject to charge L.388/78. (See "LM4"). There is some evidence of subsequent payment of $8,274/– by the respondent to the chargee-bank for the discharge of the said charge. I would take this amount into consideration in favour of the respondent. This, added to the consideration of $2,000/– in L.4863/1978, comes to $10,274/–. After deducting this from the accepted valuation of $21,000/–, the difference is $10,726/–.

In the result, there shall be:

(1) A declaration that the consideration for the conveyance by the bankrupt Yii Hieng Kiew to the respondent Yii Hieng Lai of the subject land *vide* Memorandum of Transfer dated October 4, 1978 and registered at the Land Office, Sibu on November 16, 1978 as Sibu Instrument No. L.4863/1978 was lower than the fair market value of the subject land at the time of the said conveyance.